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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 330

BALTIMORE TRANSIT COMPANY
and
GERALD M. HARRISON,
Petitioners,

vs.

STATE OF MARYLAND, for the use of
GLORIA S. GEILS, et al,
Respondents.

PETITION FOR REHEARING
Of Order Denying Petition for Writ of Certiorari

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INDEX.

	Page
Reasons for granting rehearing and issuing the writ	1
Conclusion	5
Certificate of counsel	5

Cases Cited.

Ayers v. Kidney, et al., 333 F. 2d 812 (1964)	3
E. I. Du Pont Nemours & Company v. Leadner, 221 Miss. 378, 73 So. 2d 249	2
Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817	1
Grey v. Hayes-Sammon Chemical Co., 310 F. 2d 291	2
Grier v. Rosenberg, 213 Md. 248, 131 A. 2d 737 (1957)	2
McKinley v. Rawls et al., 333 F. 2d 198 (1964)	4
Necaise v. Chrysler Corporation, 335 F. 2d 562 (1964)	2
Schelp v. National Surety Corporation, 333 F. 2d 431 (1964)	3
St. Paul Mercury Insurance Company v. Huitt, et al., 336 F. 2d 37 (1964)	3

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Petitioner prays that this Court grant rehearing of its order of October 12, 1964, denying Petition for Writ of Certiorari, and that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered March 9, 1964, in the above entitled case.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

Since the filing of the Petition for Writ of Certiorari on July 27, 1964, several cases have been reported in the Fifth and Sixth Circuits which manifest so different an application of the doctrine in *Erie R. Co. v. Tompkins*,[1] as to

[1] 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817.

create a substantial controversy between the application of that doctrine in those circuits and its application by the Fourth Circuit in the instant case.

Although the facts do not lend themselves to comparison, the existing state law in *Necaise v. Chrysler Corporation*[2] was parallel in almost every respect to existing state law in the instant case. The *Erie* doctrine applied by the Sixth and Fourth Circuits, respectively, produced results in direct and irreconcilable conflict with each other. In *Necaise*, the decision of the Sixth Circuit Court of Appeals turned upon dictum contained in the Opinion of the Supreme Court of Mississippi in *E. I. Du Pont Nemours & Company v. Leadner*.[3] In reaching a decision in *Necaise*, the Sixth Circuit referred to its previous decision in *Grey v. Hayes-Sammon Chemical Co.*,[4] stating that under the *Erie* doctrine, they were required to sit as a Mississippi court. The circuit court determined from the dictum in *Du Pont* that if the Supreme Court of Mississippi were sitting to decide the issue before the Sixth Circuit, they would deviate from their prior decisions. To the extent that that deviation was expressed in the dictum in *Du Pont*, the Sixth Circuit applied the *Erie* doctrine and modified otherwise controlling state decisions.

The Fourth Circuit, in the instant case, also had before it prior controlling state decisions on the issue to be decided. Those cases were decided by the Maryland state courts between 1833 and 1939 and were without equivocation as to their effect. The Fourth Circuit also had a recent case, *Grier v. Rosenberg*,[5] which contained dictum relating to the effect of presumptions in negligence cases. However, instead of applying the dictum in the *Grier* case,

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[2] 335 F. 2d 562 (1964).

[3] 221 Miss. 378, 73 So. 2d 249.

[4] 310 F. 2d 291.

[5] 213 Md. 248, 131 A. 2d 737 (1957).

which was in every respect consistent with prior controlling cases covering over half a century of Maryland law, the Fourth Circuit failed to apply the Maryland law as expressed in *Grier* and the prior controlling decisions and instead, applied its own law. The opposite results obtained by the application of the *Erie* doctrine between these two circuits compels this Court to re-examine the Petition for Writ of Certiorari and warrants invoking its jurisdiction in this case.

Erie, as applied under the mandate of this Court, is contained in the following recent cases:

Sixth Circuit—In *Ayers v. Kidney, et al.*,[6] the Sixth Circuit was presented with a diversity case involving Ohio law upon which there was much disagreement in the state court decisions. The circuit court sat as an Ohio court in resolving the issues of state law, guided by existing state cases.

St. Paul Mercury Insurance Company v. Huitt, et al.,[7] was a diversity proceeding on a contract issued in the State of Michigan. The circuit court correctly expressed the application of Federal law in such a case as being controlling only "in the absence of a precedent in the state courts."

Fifth Circuit—In *Schelp v. National Surety Corporation*,[8] the Fifth Circuit was faced with an intermediate state appellate court decision squarely in point on the question before them. However, they properly held that "*Erie* did not command allegiance to a case on all fours where there was 'persuasive data that the highest court of the state would decide otherwise' than the intermediate appellate state

[6] 333 F. 2d 812 (1964).

[7] 336 F. 2d 37 (1964).

[8] 333 F. 2d 431 (1964).

court." The intermediate state decision was a single, aberrant deviation from the principle established in prior cases decided by the state court of last resort. Here again, a United States Circuit Court of Appeals sat as a state court in fulfillment of its duty to state citizens in diversity cases.

The paradox of the case here presented is found in *McKinley v. Rawls et al.*,[9] decided by the Fourth Circuit subsequent to the instant case. In *McKinley*, the Fourth Circuit correctly applied *Erie* by adopting the law of South Carolina, in defining deviation, on the issue between diverse citizens as to whether the agent of the corporate defendant was operating the master's vehicle in deviation from the bounds of his employment. The definition applied by the Fourth Circuit was in accordance with existing state decisions.

Thus, the Fourth Circuit stands alone in conflict with itself and with other circuits upon the proper application of *Erie*.

In no other proceeding before Federal tribunals does the maxim "*judicis est jus dicere, non dare*" have greater force than in diversity cases. It was to eliminate the double standard of law arising from the failure of Federal courts to apply this maxim that this Court announced the doctrine in *Erie*. This Court, then cognizant of its duties to protect the rights of diverse citizens, will now have abandoned that duty to the citizens of five states and the District of Columbia, over whom the Court of Appeals for the Fourth Circuit has jurisdiction, if the rehearing is not granted and if Circuit courts are permitted to continue to make inconsistent and conflicting applications of a clear mandate issued by this Court.

[9] 333 F. 2d 108 (1964).

CONCLUSION.

For the reasons set forth above and those contained in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and Writ of Certiorari issued, or in the alternative, that judgment for the Petitioners be entered in accordance with prior controlling decisions of this Court.

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Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of this Court.

.....
George P. Bowie.